IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

HAROLD R. SMITH,
Appellant,

vs.

No. 1096

EASTERN ORTHODOX CHURCHES OF GREATER DETROIT, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

SUPPLEMENTAL BRIEF OF APPELLANT

The final Order of the Supreme Court of Michigan which is on appeal is not an "advisory opinion" as suggested by the language of the Legislature and the appellees. It is, in legal effect, a final judgment, and it is the legal effect of the Order that should control.

The statute, Act 100 P.A. 1970, provided annual appropriations from funds raised by taxation for the support of non-public, religious schools, the appropriation for the school year commencing July 1, 1970 not to exceed $22,000,000.00. The statute was to take effect September 1, 1970, but not until the "advisory opinion" of the Michigan Supreme Court.

The Order of the Michigan Supreme Court was entered on September 10, 1970. The Order was final; for the Supreme Court of Michigan is the highest court of the State

from which there is no appeal. No petition for rehearing was filed.

The tax funds were thus made available, retroactively, to July 1, 1970 by final Order. They would have been disbursed would it not have been for two events: (1) the adoption, on November 3, 1970, of a Michigan constitutional amendment, which is now before the Michigan Supreme Court; and (2) the appeal to this Court, which was docketed on December 14, 1970.

The statute appropriating the tax funds, although in the form of an opinion, is self-executing like any other judgment, no further action on the part of the executive, the Legislature or the courts is required for their disbursement.

The validity of the statute, Act 100 P.A. 1970, was drawn in question on the ground of its being repugnant to the Constitution of the United States, not in the Brief, but in the application of appellant for leave to file a Brief as *amicus curiae*. Jurisdictional Statement, Appendix C, paragraphs 7-10. Thus, the invitation of the Michigan Supreme Court to an interested party to file a Brief was accepted by appellant, and a Brief was filed. The only parties to the proceeding before the Michigan Supreme Court were those named as appellees in the Jurisdictional Statement. If none of those parties could appeal to the Supreme Court of the United States, the Legislature and the Supreme Court will have discovered (perhaps by accident) a method by which review by this Court of the final judgment of the highest court of a state on constitutional grounds may be evaded. This result certainly was not intended by the Michigan Supreme Court and should not be permitted by this Court in abdication of its position as the final interpreter and guardian of the Constitution of the United States.

The appellees question the "standing" of the appellant. Appellant requested permission to file a Brief as "a taxpayer and as a person interested in the determination." Permission was granted and the Brief, filed. The Brief is

criticized for brevity, not by the Court, but by the appellees. The only case cited was *DiCenso*, a three-judge decision which is now docketed in this Court on appeal. The opinion of the District Court of Rhode Island, which far surpassed the limited abilities of appellant, was quoted extensively by the dissenting judges in the opinion of the court below. It was the opinion of appellant that no further and extended Brief was necessary under the circumstances.

The "standing" of appellant in this Court is predicated upon the acceptance of his appearance below as a "taxpayer." *Flast v. Cohen*, 392 U.S. 83; 88 S.Ct. 1942. Appellant challenges the expenditures for non-public, religious schools as repugnant to the Establishment Clause of the First Amendment to the Constitution of the United States, page 103. He has "standing" consistent with Article III of the United States Constitution to invoke the federal judicial power, page 105.

Referring to the Establishment Clause, Mr. Justice Stewart said, in his concurring opinion, at page 114:

> "Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution."

Referring to the same clause, Mr. Justice Fortas stated, at page 115:

> "Perhaps the vital interest of a citizen in the establishment clause, without reference to his taxpayer's status, would be acceptable as a basis for this challenge. We need not decide this but certainly, I believe, we must recognize that our principle of judicial scrutiny of legislative acts which raise important constitutional questions requires that the issue here presented — the separation of church and state — which the Founding Fathers regarded as fundamental to our constitutional system — should be subjected to judicial testing. This is not a question

> which we, if we are to be faithful to our trust, should consign to limbo, unacknowledged, unresolved, and undecided."

Appellant relies on his position as a taxpayer and also on his position as a member of the bar of this Court in his endeavor alone, and at his own expense, to defend one of the most important provisions of the Constitution of the United States and to preserve the barrier which our forefathers under the leadership of Madison and Jefferson erected to protect us from religious controversy.

The words "*amicus curiae*" as applied to appellant, are not fully descriptive of his position before this Court. They do not defeat his standing as a taxpayer or as a party interested in the determination of this appeal. And, certainly, the use of the words by the Court below should not be permitted to operate as a barrier to his appeal on a constitutional question to this Court. *Auto Workers v. Scofield*, 382 U.S. 205. This Court said, at page 207, of the *Scofield* decision:

> "A decision of the Seventh Circuit denied a motion to intervene, but authorized the union to file a brief as *Amicus curiae* without leave to participate in oral argument. The union sought review here, and we granted *certiorari* to review the denial of intervention because of the importance of the issue and the conflict among the courts of appeals. 379 U.S. 959. Further proceedings were stayed pending the completion of our review."

Certiorari was granted, and the cause was reversed and remanded.

After reading the Brief in Support of the Motion of the Attorney General to Dismiss or Affirm, there can be little doubt with respect to the importance of the issues and the urgency of a prompt review. At least it may be said that the Governor, the Legislature and the Supreme Court of Michigan considered the matter important. But the

urgency of the issue will not be satisfied by this Court dismissing the appeal and relegating the parties to future litigation over federal constitutional issues to the courts of Michigan and, perhaps, thereafter to future appeals to this Court.

After all, the last word on constitutional questions comes from the Supreme Court of the United States and not from the Supreme Court of any state.

Respectfully submitted,

HAROLD R. SMITH, *pro se and Counsel for Appellant*
225 Merriweather
Grosse Pointe Farms, Mich. 48236

Dated: January 15, 1971.